

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

CLARENCE BROWN,

Petitioner,

v.

No. 11-cv-0917 MV/SMV

**ERASMO BRAVO, Warden,
ATTORNEY GENERAL OF THE STATE
OF NEW MEXICO,**

Respondents.

**ORDER DENYING PETITIONER'S SECOND MOTION FOR TRANSFER PURSUANT
TO RULE 23(A) AND RULE 23(B)(2)
AND DENYING REQUEST FOR APPOINTMENT OF COUNSEL**

THIS MATTER comes before the Court on Petitioner's [Second] Motion for Transfer Pursuant to Rule 23(a) & Rule 23(b)(2) Rule of Appellate Procedures [Doc. 14] ("Second Motion for Transfer"), filed on March 28, 2012.¹ Respondents filed no response, and none is needed. The Court will DENY the motion as moot because Petitioner has apparently been transferred already. To the extent that Petitioner also requests counsel, the request will be DENIED at this time.

On March 20, 2012, Petitioner filed his [First] Motion for Transfer Pursuant to Rule 23(a) & Rule 23(b)(2) Federal Civil Judicial Procedure & Rules [sic] [Doc. 12] ("First Motion for Transfer"), asking the Court to allow him to transfer from his current custodian to a different custodian pursuant to "Rule 23(b)(2)." *Id.* at 1, ¶ 2. The Court denied the First Motion for Transfer on March 23, 2012, because the rule cited by Petitioner did not give the Court authority to grant the

¹ Petitioner is incarcerated, proceeding *in forma pauperis*, and appearing pro se. Prisoner's Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915 [Doc. 2] at 2, ¶ 6; Order [Doc. 3].

relief requested. Order Denying Petitioner's [First] Motion for Transfer Pursuant to Rule 23(a) and Rule 23(b)(2) [Doc. 13].

In this Second Motion for Transfer, Petitioner again "seeks the Court[']s decision on being allowed to move from a level three custodian to a level two custodian." *Id.* at 1. Petitioner adds, "I am being moved to a level 2 facility[.] I just want to inform the Court." *Id.* at 3. Indeed, Petitioner submitted a notice of change of address with the Court on April 10, 2012, indicating that he had been transferred to another detention facility. Untitled Letter [Doc. 15]. Because Petitioner has already been moved to another facility, the Second Motion for Transfer will be denied as moot.

Finally, Petitioner mentions in his Second Motion for Transfer, "I really need a lawyer[.] I have messed up the state habeas[.] the writ of [certiorari][.] and now I am probably messing this up[.] I am so illiterat[e] at all this law stuff[.] and I have legitimate claims and no one to help me." Second Motion for Transfer [Doc. 14] at 3.

There is no constitutional right to counsel in habeas proceedings. *See Coronado v. Ward*, 517 F.3d 1212, 1218 (10th Cir. 2008). Instead, whether to appoint counsel is a matter left to the discretion of the court. *Swazo v. Wyo. Dep't of Corr.*, 23 F.3d 332, 333 (10th Cir. 1994). In so deciding, courts should consider "the merits of the litigant's claims, the nature of the factual issues raised in the claims, the litigant's ability to present his claims, and the complexity of the legal issues raised by the claims." *Rucks v. Boergermann*, 57 F.3d 978, 979 (10th Cir. 1995) (internal quotation marks omitted). Ultimately, the burden is on the petitioner "to convince the court that there is sufficient merit to his claim to warrant appointment of counsel." *Hill v. Smithkline Beecham Corp.*, 393 F.3d 1111, 1115 (10th Cir 2004) (internal quotation marks omitted).

Petitioner is adequately presenting his claims. Moreover, the Court is not persuaded that there is sufficient merit or complexity in the Petition to warrant appointment of counsel at this time.

IT IS THEREFORE ORDERED that Petitioner's [Second] Motion for Transfer Pursuant to Rule 23(a) & Rule 23(b)(2) Rule of Appellate Procedures [Doc. 14] is **DENIED as moot**.

IT IS FURTHER ORDERED that Petitioner's request for appointment of counsel is **DENIED**.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'S. Vidmar', is written above a horizontal line.

STEPHAN M. VIDMAR
United States Magistrate Judge